No. 75-1736

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

APEX OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-9) is reported at 530 F. 2d 1291. The order of the district court (Pet. App. A-1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976, and a timely petition for rehearing (Pet. App. A-10) was denied on March 29, 1976. On April 8, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari until May 28, 1976, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a corporate owner-operator can be prosecuted as the "person in charge" of a polluting facility,

as that term is used in Section 311(b)(5) of the Federal Water Pollution Control Act.

2. Whether the indictment properly alleged and the evidence sufficiently proved that petitioner knowingly failed to report two oil discharges.

STATEMENT

After a jury-waived trial on stipulated facts in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of failing to report an oil discharge, in violation of 33 U.S.C. (Supp. IV) 1321(b)(5). Petitioner was fined $10,000 on each count and placed on probation for three years; however, execution of $15,000 of the fine was stayed on condition that petitioner not violate any law relating to pollution during the probation period. The court of appeals affirmed (Pet. App. A-2 to A-9).

As the stipulated facts established, two oil spills occurred at petitioner's terminal facility on the Mississippi River in St. Louis, Missouri (Pet. App. A-8 to A-9). The first spill occurred on January 14, 1972, when a cargo transfer hose at the facility ruptured, causing approximately 294 gallons of oil to spill into the river. One of petitioner's employees, James Washington, was in charge of the facility at the time of the spill, but he did not notify the Coast Guard or the Environmental Protection Agency of the discharge. The Coast Guard discovered the spill later that day when they found petitioner's employees removing oil from the facility deck and the river (Pet. 4; Pet. App. A-9).

The second spill occurred on the morning of January 12, 1974, while one of petitioner's barges was unloading a cargo of oil at the facility. A gasket in the facility's piping system failed, allowing approximately 10 gallons of oil to flow into the river. An employee of petitioner,

Robert J. Smith, was in charge of the facility at the time of the spill and was the only known witness to its occurrence. He did not report the spill to the Coast Guard or the Environmental Protection Agency. Upon information supplied by a third party, the Coast Guard eventually traced the discharge to petitioner's facility (Pet. 3-4; Pet. App. A-8 to A-9).

ARGUMENT

1. Petitioner contends (Pet. 6) that it was improperly convicted of failing to report these discharges because it was not the "person in charge" of the facility at the time of the spills, as that term is used in Section 311(b)(5) of the Federal Water Pollution Control Act, as added, 86 Stat. 864, and amended, 33 U.S.C. (Supp. IV) 1321(b)(5). It argues that Congress intended that the individual actually responsible for the operations of the facility be considered the "person in charge."

However, the court of appeals properly held (Pet. App. A-3 to A-8) that a corporation could be a "person in charge" within the meaning of Section 311(b)(5). Under Section 311(a)(7) of the Act, as added, 86 Stat. 862, and amended, 33 U.S.C. (Supp. IV) 1321(a)(7), the class of "persons" subject to the Act "includes an individual, firm [or] corporation * * * ." The legislative history of the Act, the court of appeals concluded, "suggests that liability under the statute is to be limited to those responsible for the operation of the oil facility. The corporation is certainly within that class" (Pet. App. A-7). In short, nothing in the language or legislative history of the Act bars application of the familiar doctrine of *respondeat superior* under these circumstances.

The court below correctly noted (Pet. App. A-4 to A-6) that petitioner's proposed construction of this phrase would frustrate the very purposes of the Act. The

corporate owner of industrial facilities is uniquely qualified to assume the burdens of complying with the Water Pollution Control Act and has full authority to direct the activities of its employees to minimize the potential for such accidental discharges. If a corporation were not considered a "person in charge" of the facility, it would have little incentive to train its employees to comply with the Act by reporting small spills, to the ultimate detriment of the environment.[1]

Moreover, as the court of appeals held (Pet. App. A-7 to A-8), the Coast Guard regulations establishing the procedures to be followed by the individual "person in charge" of a facility in reporting spills do not address the question whether corporations can be liable under the criminal provisions of Section 311(b)(5). See 33 C.F.R. 153.01(g). Thus, the court below properly did not defer to the definition of "person in charge" contained in those regulations.

The decision below is in agreement with the decicions of the other two courts of appeals that have considered this question. *United States* v. *Mobil Oil Corp.*, 464

[1]This case presents no occasion to review the question whether Section 311(b)(6), as added, 86 Stat. 864, and amended, 33 U.S.C. (Supp. IV) 1321(b)(6), imposes a criminal or civil penalty. Compare *United States* v. *General Motors Corp.*, 403 F. Supp. 1151 (D. Conn.), and *United States* v. *Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W. Va.) (civil penalty), with *United States* v. *LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La.) (criminal penalty), appeal pending, C.A. 5, No. 74-3140, argued October 13, 1975. Petitioner raises this issue merely to bolster its policy argument regarding the most effective method of enforcing the Act. However, because it did not report these discharges, the exemption from criminal prosecution provided in Section 311(b)(5) is inapplicable. Thus, petitioner could not attack the imposition of a Section 311(b)(6) fine even if, in derogation of the express congressional intent (Pet. App. A-6, n. 7), it is ultimately determined that such a penalty constitutes a criminal sanction.

F. 2d 1124, 1127 (C.A. 5); *United States* v. *Republic Steel Corp.*, 491 F. 2d 315, 317 (C.A. 6); see *United States* v. *Hougland Barge Line, Inc.*, 387 F. Supp. 1110, 1115-1116 (W.D. Pa.); *United States* v. *General American Transportation Corp.*, 367 F. Supp. 1284, 1287-1289 (D. N.J.); *United States* v. *Reynolds Metals Co.*, 359 F. Supp. 338, 339 (S.D. Tex.); *contra, United States* v. *Skil Corp.*, 351 F. Supp. 295 (N.D. Ill.).

2. Petitioner also contends (Pet. 8) that it was improperly convicted because the indictment did not allege, and the stipulated facts did not prove, an essential element of the offense—that it had actual knowledge of the oil discharges. However, both counts of the indictment alleged that petitioner knowingly failed to report the spills (Pet. App. A-9, n. 11). The stipulated facts established that petitioner's employees in operational charge of the facility had actual knowledge of the discharges. The court of appeals correctly held that the knowledge of its employees could be attributed to petitioner. See *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 125; *New York Central & Hudson River R.R. Co.* v. *United States*, 212 U.S. 481, 494. Therefore, the stipulated facts satisfied the scienter requirement of Section 311(b)(5). Thus, the indictment was not defective, and the evidence was sufficient to support petitioner's conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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